No. 6177.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
KEIZO KAMIYAMA
For a Writ of Habeas Corpus.

Keizo Kamiyama,
Appellant,
vs.
Walter E. Carr, District Director, United States Immigration Service,
Appellee.

BRIEF OF APPELLANT, KEIZO KAMIYAMA.

J. Edward Keating,
Theodore E. Bowen,
Attorneys for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

PAGE

Statement of the Case 3

Specifications of Error Relied Upon 5

Argument 5

(A) There is no evidence to sustain the warrant of deportation 6

(B) Keizo Kamiyama was not given a fair hearing 9

Excerpts from the Testimony:

Keizo Kamiyama 7

K. Nishimoto 8

Inspector Scott 19, 20

Conclusion 29

TABLE OF CASES AND AUTHORITIES CITED.

PAGE

Bilokumsky v. Todd, 263 U. S. 149, 68 L. Ed. 221..... 14

Charley Hee v. United States (C. C. A. 1st), 19 Fed. (2d) 335 14

Chew Hoy Quong v. White (C. C. A. 9th, 1918), 249 Fed. 869 28

Ex parte Bunji Une (D. C. S. D. Cal. 1930) 41 Fed. (2d) 239 21

Ex parte Jackson (D. C. Mont., 1920) 263 Fed. 110.... 27

Ex parte Mouratis (D. C. N. D. Cal. 1927), 21 Fed. (2d) 694 21

Ex parte Radivoeff (D. C. Mont., 1922), 278 Fed. 227 27

Ex parte Tozier (D. C. Me., 1924), 2 Fed. (2d) 268.. 29

Fat v. White (1920), 253 U. S. 454; 64 L. Ed. 1010.. 27

Gung You v. Nagle (C. C. A. 9th, 1929), 34 Fed. (2d) 848 9

Immigration Act of February 5, 1917 (8. U. S. C. 155), Section 19.....6, 11

In re Chan Foo Lin (C. C. A. 6th), 243 Fed. 137....21, 27

Kwock Jan Fat v. White (1920), 253 U. S. 454, 64 L. Ed. 1010..... 21

McDonald v. Siu Tak Sam (C. C. A. 8th, 1915), 225 Fed. 710 27

Rule 18, Subdivision B, Paragraph 1 (Immigration Rules of March 1, 1927)..... 12

Rule 18, Subdivision D, Paragraph 1 (Immigration Rules of March 1, 1927)..... 13

Rule 27, Subdivision (f), Paragraph 1 (Immigration Rules of March 1, 1927)..... 12

PAGE

Section 3 (8 U. S. C. 136), Section 19 (8 U. S. C. 155) Immigration Act of 1917..... 23

Svarney v. U. S. (C. C. A. 8th, 1925), 7 Fed. (2d) 515 at 517.....21, 27

The Act of February 27, 1925 (8 U. S. C. 110)..... 11

Ungar v. Seaman (C. C. A. 8th, 1924), 4 Fed. (2d), 80 at 83.....21, 27

U. S. *ex rel* Murphy v. McCandless (D. C. E. D. Penn., 1930), 40 Fed. (2d) 643..... 16

U. S. *ex rel* Schachter v. Curran (C. C. A. 3d 1925), 4 Fed. (2d) 356..... 9

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STATEMENT OF THE CASE.

This is an appeal from an order discharging a writ of habeas corpus and remanding Keizo Kamiyama to the custody of the United States Immigration Service. [Transcript of Record, page 19.]

The original records of the Department of Labor have been filed with the clerk of this court pursuant to an order of the District Court. [Transcript of Record, page

27.] Throughout this brief, we will refer to those records as "Immigration File." The printed transcript of the proceedings in the District Court will be referred to as "Transcript of Record."

Keizo Kamiyama is an alien subject of Japan, who was ordered deported from this country by the Secretary of Labor on two charges, to-wit: (a) That he was not at the time of his entry into the United States in possession of an unexpired Immigration visa; and (b) that he is an alien ineligible to citizenship and not exempted by Paragraph C of Section 13 of the Immigration Act of 1924 from the operation of that Act. (Immigration File, Warrant of Deportation.)

The facts regarding Keizo Kamiyama's entry into the United States and the facts surrounding the deportation proceedings against him will be fully set forth in the argument.

After Keizo Kamiyama had been ordered deported, and while in the custody of Walter E. Carr, District Director of Immigration at Los Angeles, he filed a petition for a writ of habeas corpus, alleging in substance that he had been in this country continuously for a period in excess of five years, that there was no evidence to sustain the warrant of deportation, and that he was not given a fair hearing. [Transcript of Record, pages 3 to 7.] The writ by order of the District Court [Transcript of Record, page 6] was issued and served. [Transcript of Record, pages 10 and 11.] Return was duly made. [Transcript of Record, pages 11 to 17.] It was stipulated in open court that the petition was to be considered for all purposes as a traverse. [Transcript of Record, page 18.] The evi-

dence adduced at the hearing on the writ consisted of the records of the United States Immigration Service now on file with the clerk of this court. Thereafter, the court made its order discharging the writ and remanding Keizo Kamiyama to the custody of the Immigration Service. [Transcript of Record, pages 19 and 20.] From that order this appeal is presented.

SPECIFICATIONS OF ERROR RELIED UPON.

The specifications of error relied upon by appellant are as follows:

Specification 1: The court erred in holding that the deportation of Keizo Kamiyama was not barred by the provisions of Section 19 of the Immigration Act of February 5, 1917. This is Assignment of Error No. 5, Transcript of Record.

Specification 2: The court erred in holding and deciding that there was some evidence to sustain the warrant of deportation. This is Assignments of Error 1, 2 and 3, Transcript of Record.

Specification 3: The court erred in holding that Keizo Kamiyama was given a fair hearing. This is Assignment of Error No. 4, Transcript of Record.

ARGUMENT.

In support of our contention that the Secretary of Labor had no authority to issue the warrant of deportation against Keizo Kamiyama, we urge two propositions: First, that there is no evidence to sustain the warrant of deportation, in that the evidence affirmatively and conclusively shows that Keizo Kamiyama had been contin-

uously in this country for a period in excess of five years before the institution of the deportation proceedings; and second, that Keizo Kamiyama was not given a fair hearing by the Immigration Service.

We will take up these points in the order named.

(A) There is no evidence to sustain the warrant of deportation:

It is undoubtedly conceded by respondent that no alien is deportable on the charges named in the warrant against Keizo Kamiyama if he has resided in the United States for a period in excess of five years before the institution of the proceedings by the issuance of the warrant of arrest. This period of limitation is laid down by Section 19 of the Immigration Act of February 5, 1917 (8 U. S. C. 155), which, among other things, provides:

> "That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

The Immigration File discloses that the proceedings were not instituted against Keizo Kamiyama until November 19, 1928. (Immigration File, Warrant of Arrest.) The evidence adduced before the Immigration Service showed that Keizo Kamiyama last entered this country in 1920. There is not a scintilla of evidence to the contrary. For the moment we will disregard the unfairness inherent throughout the hearing and discuss the evidence produced, notwithstanding the method by which some of it was obtained. At the preliminary examination of No-

vember 17, 1928, Keizo Kamiyama testified (Immigration File, page 1):

> "I last entered the United States at a point about two miles west of Calexico, California, coming from Mexicali, Mexico, on or about February 13, 1920, I came alone."

Again at the regular hearing of December 27, 1928, he reiterates his previous testimony (Immigration File, page 2):

> "Atty.: In this statement, you stated to Insp. Scott that you last entered the United States two miles west of Calexico on or about February 13, 1920; is that right? A. Yes, sir.
>
> Q. Have you ever been out of the United States since then? A. No."

The Immigration Service did not produce one word of testimony or any other kind of evidence to dispute the alien's claim that he last entered the United States in February, 1920. Kamiyama, on the other hand, corroborated his assertions by unimpeached documentary evidence, all of which was made a part of the record and attached thereto as exhibits. We invite the court to examine them. They were all introduced at the hearing of December 27, 1928, (Immigration File), and are as follows:

> *Alien's Exhibit A:* Envelope addressed to K. Kamiyama, postmarked Redondo Beach, California, February 15, 1922;
>
> *Alien's Exhibit 2:* Envelope addressed to K. Kamiyama, postmarked Palms, California, November 2, 1922;
>
> *Alien's Exhibit 3:* Receipt dated November 16, 1921, issued by the Japanese American to Keizo Kamiyama;

Alien's Exhibit 4: Entry in the 1922 edition of the "Japanese Who's Who in America," showing Kamiyama was here in that year;

Alien's Exhibit 5: Envelope addressed to Kamiyama Keizo postmarked Redondo Beach, California, November 1, 1921;

Alien's Exhibit 6: Receipt showing Keizo Kamiyama donated to the fund for the sufferers of the Yokohama earthquake in 1923.

At the hearing of December 27, 1928 (Immigration File) Keizo Kamiyama also minutely detailed the various places where he had worked and resided in California since his entry in 1920. At the continued hearing of March 13, 1929, K. Nishimoto, an American citizen, testified in further corroboration of Kamiyama's own testimony previously given. Part of his testimony is as follows (page 15):

"Q. Mr. Nishimoto you know Keizo Kamiyama, do you not? A. Yes.

Q. This boy sitting present here? A. Yes.

* * * * * * * * *

Q. So this man Keizo Kaimayama might have been working for three or four different foreman? A. Yes.

Q. And you had some 12 foreman at that time, operating some twelve places? A. Yes.

Q. And you don't know or remember exactly foreman he was working for one month and which one he was working for the next month? A. No.

Q. But you know he was on the place there a couple of years? A. Yes.

Q. In 1923 and 1924? A. Yes."

Not a single witness was called by the Immigration Service. No evidence was produced to show that any of

the documents were false or fraudulent. Certainly the Immigration Service cannot choose to disregard this positive testimony when none was offered to refute it. *U. S. ex rel Schachter v. Curran* (C. C. A. 3d 1925), 4 Fed. (2d) 356.

A perusal of the record will disclose that the government's case was based, not on evidence, but solely on vague suspicion and innuendo unsupported by any facts. They suspect that the alien at bar is not Keizo Kamiyama, but produce no evidence to this effect. *Furthermore, if he is not Keizo Kamiyama, why are they attempting to deport him as Keizo Kamiyama?* Likewise they suspect that he did not enter the United States in 1920, but produce no evidence to substantiate this suspicion.

Some reference is made by the immigration officials to certain small discrepancies between the alien's testimony at the preliminary examination (unfairly taken) and his testimony at the later stage of the proceedings. These discrepancies as to age, etc., are undoubtedly explained by the fact that the record of the preliminary investigation was taken down in longhand by the inspector at a time while the alien was in great fear and under implied, if not actual, coercion. Discrepancies as to immaterial matters certainly cannot be considered as a substitute for evidence. *Gung You v. Nagle* (C. C. A. 9th, 1929), 34 Fed. (2d) 848.

(B) Keizo Kamiyama was not given a fair hearing:

In any event, the practices engaged in by the immigration officials in the instant case were such as to deprive Keizo Kamiyama of a fair trial.

First—He was arrested without a warrant and interrogated while confined incommunicado and without bail;

Second—Evidence was received outside the trial and outside the presence of the accused and without notifying him or his counsel;

Third—Records and testimony taken in other cases were used against the alien without giving him the opportunity to cross-examine the witnesses therein or to explain or rebut their testimony;

Fourth—Anonymous communications were considered as evidence without giving the alien the opportunity of seeing, explaining or rebutting them.

We will now consider the circumstances surrounding the arrest of Keizo Kamiyama. The immigration record discloses that Keizo Kamiyama was arrested and locked up on November 17, 1928 (Immigration File), without a warrant and without any right or authorization whatsoever. A statement was taken from him on that day, November 17, 1928, and made the basis for a warrant of arrest which was issued on the 19th, or two days after he had been actually arrested. During that time he was held incommunicado and denied bail.

The first question is, may the statement taken in such a high-handed, arbitrary manner be made the basis of a warrant of deportation? If so, *unlimited* power is placed in the hands of any single immigration inspector in the service of the United States. He holds in his hands the liberty of every person in this country, be he alien or be he citizen. If an immigration inspector is clothed with the authority to arrest without warrant or charges, place

the person in secret confinement, and then proceed to hold a secret hearing without a reporter, write it up himself to suit himself, and then use that statement as the basis of deportation, then, we repeat, no one of us is safe. But we respectfully submit that the courts will not permit such tyranny in any civilized country.

It needs no citation of authority to establish that due process of law requires primarily that a deportation proceeding to be fair must be conducted in the manner prescribed by statute or at least in the manner prescribed by rules of the Department of Labor. Therefore, it should be noted that there is nothing in the immigration act itself nor in the rules adopted by the Department of Labor, authorizing or conferring upon an immigration inspector, or anyone else, the authority to arrest without a warrant.

Section 19 of the Immigration Act of 1917 (8 U. S. C. 155) enumerates the classes of aliens which may be deported, and provides:

> "* * * shall, *upon the warrant of the Secretary of Labor*, be taken into custody and deported."

Lest the foregoing section be ambiguous, Congress passed a later act clearly setting out the only cases in which an immigration official might arrest without a warrant. The Act of February 27, 1925 (8 U. S. C. 110) provides:

> "Any employee of the Bureau of Immigration authorized so to do under regulations prescribed by the Commissioner General of Immigration with the approval of the Secretary of Labor, shall have power without warrant (1) to arrest any alien *who in his presence or view is entering or attempting to enter*

> *the United States* in violation of any law or regulation made in pursuance of law regulating the admission of aliens, and to take such alien immediately for examination before an immigrant inspector or other official having authority to examine aliens as to their right to admission to the United States, and (2) to board and search for aliens any vessel within the territorial waters of the United States, railway car, conveyance, or vehicle, in which he believes aliens are being brought into the United States; and such employee shall have power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens. (Feb. 27, 1925, c. 364, Title IV, 43 Stat. 1049.)" (Italics ours.)

The very rules of the immigration service also provide that no immigration official shall arrest an alien without a warrant unless the alien is seen in the act of surreptitiously entering the United States. See rule 27, subdivision (f), paragraph 1, part of which provides as follows (Immigration Rules of March 1, 1927):

> "Any immigrant inspector, Chinese inspector acting as an immigrant inspector, or patrol inspector may, without warrant, arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation in pursuance of law regulating the admission of aliens, * * *."

The Department of Labor has also laid down rules governing the procedure in deportation proceedings, which we respectfully submit must be followed in order that the alien be accorded the fundamentals of due process of law. The present rule 18 covers this subject. Formerly this rule was No. 22, and in many of the older cases it is so referred to by the courts. Subdivision B, paragraph 1, of rule 18 (Immigration Rules of March 1, 1927), lays

down the manner of applying for a warrant for the arrest of an alien who is already in the United States as follows:

> "The application must state facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence. If the facts stated are within the personal knowledge of the inspector reporting the case, or such knowledge is based upon admissions made by the alien, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the government (except in cases of public charges covered by subdivision C hereof), the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an inspector."

The Department of Labor recognizes, however, that there are certain cases where prompt action is necessary, and so provides that a warrant of arrest in certain cases may be applied for and issued by telegraph. This is covered by subdivision D, paragraph 1, of rule 18, (Immigration Rules of March 1, 1927) as follows:

> "Upon receipt of a telegraphic or formal warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. Pending determination of the case, in the discretion of the immigration officer in charge, he may be taken into custody or allowed to remain in some place deemed by such officer secure and proper, except that in the absence of special instructions an alien confined in an institution shall not be removed therefrom until a warrant of deportation has been issued and is about to be served."

Thus, the rules of the Department itself do not permit an inspector to take an alien into custody prior to the receipt of a warrant of arrest. To be sure, these rules do not prevent an inspector from taking a *voluntary* statement from an alien prior to his application for the warrant of arrest, but plainly these rules do not authorize an immigration inspector to imprison an alien before he has even applied for a warrant, before any charges are pending, and by holding him incommunicado, force a statement out of him. The courts have refused to countenance such methods.

In *Bilokumsky v. Todd,* 263 U. S. 149, 68 L. Ed. 221, the Supreme Court held that a statement taken from an alien while *lawfully* in confinement could be used against him in deportation proceedings, but the court says at page 224, L. Ed.:

> "It may be assumed that evidence obtained by the department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings, * * * but mere interrogation under oath by a government official of one *lawfully* in confinement, is not a search and seizure." (Italics ours.)

The only inference in the above quotation is that the taking of a statement from an alien unlawfully and illegally arrested would be tantamount to an unlawful search and seizure upon which deportation could not be predicated.

Charley Hee v. United States, (C. C. A. 1st.), 19 Fed. (2d) 335, involves a Chinese alien held at an immigration station without any process for two days, during which time a statement was taken from him. The statement thus taken from him was used at the hearing without ob-

jection by his counsel, either then or at the later hearing before the District Court. In the Circuit Court, counsel for the first time contended that the statement so taken should have been excluded and disregarded. The Circuit Court, by a two to three decision, refused to reverse the District Court, on the ground that the objection could not be made the first time in the Circuit Court, and on the further ground that there was other additional evidence, fairly taken, upon which the deportation could be sustained (which fact is not present in the case at bar). The Circuit Court held, however, that such a statement was obtained unfairly, the court saying (page 336):

> "The arrest and the ensuing imprisonment before the issue of the warrant were plainly illegal. The statute in question provides that 'any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint under oath, filed by any party on behalf of the United States.' 25 Stat. 476-479; U. S. Comp. Stats. 1916, par. 4313. The rules of the Department of Labor as we understand them, also provide that a warrant should be procured before the Chinese person is arrested. See rules 23 and 24. This is similar to the practice under the Immigration Act. The cases relied on by the government arose under a different statute (27 Stats. 25 (Comp. St. pars. 4315-4323)), relating to Chinese laborers, who failed or neglected to take out certificates of registration. See Fong Yue Ting v. United States, 149 U. S. 698, 728, 13 S. Ct. 1016, 37 L. Ed. 905.
>
> "That the statement was obtained by entirely unjustifiable methods is too clear for discussion. It would not be admissible against the defendant over objection by him in any judicial proceeding, and if used against him in administrative proceedings, where the tribunal itself is charged with the duty of safe-

> guarding the defendant's rights would vitiate the result. The present proceedings were civil in their nature and judicial in character. The defendant was represented before both the commissioner and the District Court by counsel, who, as above stated, made no objection to the use of the statement on either occasion. There is no assignment of error upon it. While the commissioner or the district judge might well on his own motion have refused to hear it, it would be going too far to say that their failure to do so constituted reversible error, or that this court hearing the case upon the same record as the District Court ought to entertain an objection to this evidence, here made for the first time. Such action would be justified only when necessary to correct a clear and grave miscarriage of justice."

Judge Anderson dissented from the view taken by the majority of the court, maintaining that the unfairness was so flagrant that it should have precluded the deportation, whether raised at the hearing or not, and said at page 340:

> "To seize the person and search the memory of the frightened victim is a far grosser invasion of personal liberty and disregard of due process of law than is the search for and seizure of papers, even from a home or from an office as in the Gouled case."

In the case at bar, counsel for Keizo Kamiyama at all times protested and objected to the high-handed methods of the Immigration Service in taking the statement from him. No waiver of his rights in this regard can be found in the record. In such a case the subjecting of an alien to deportation by such means should be prevented by the courts. This is the view taken in *U. S. ex rel Murphy v. McCandless* (D. C. E. D. Penn., 1930) 40 Fed. (2d) 643. We quote from pages 644 and 645:

"The dissenting opinion of Judge Anderson, in the case of Charley Hee v. U. S. (C. C. A.) 19 F. (2d) 335, 336, was cited to us as authority for the proposition that an unwarranted arrest and detention of an alien vitiated an order of deportation which followed the unlawful custody. It was authority because the trial court had refused to discharge such alien (Judge Anderson dissenting), and the Supreme Court had reversed the trial court without opinion, thus adopting the dissenting opinion as an expression of the grounds of reversal. Such an interpretation of the ruling of the Supreme Court was wholly unwarranted, as counsel for the United States has made clear. The ruling of the court, however, is of value. 'The arrest and the ensuing imprisonment before the issue of the warrant were plainly illegal.' The legal situation is said to be 'similar to the practice under the Immigration Act.' The relator there was denied the benefit of the principle laid down solely because no seasonable claim was made for relief. The dissenting opinion expressed the only difference among the judges. This was over, not the right, but the waiver. Judge Anderson's view is to be looked for in the emphatic sentence, 'It is high time to insist that law-enforcing officials be law-abiding in the performance of their official duties.' The court unanimously voiced condemnation of the wrong done. The majority held the relator had waived the right which the court held to be his. Judge Anderson's dissenting view was thus expressed, 'The way to stop such gross invasion of fundamentally important human rights is to refuse to affirm decisions grounded thereon.' It is clear therefore that had the right been seasonably asserted it would have been allowed. It was lost only because it was waived.

"Here there has been no waiver and the right must be given effect. The relator is charged with a failure to observe the immigration laws; she is sought to be condemned by another violation. This is what should not be permitted. This means that the relator

must be discharged because subjected by unlawful means to the deportation order."

Thus, Keizo Kamiyama having been subjected to a deportation order through unlawful means, should be given his liberty.

Now passing to the second item of unfairness, it should be remarked that this case illustrates the inherent unfairness in the deportation procedure adopted by the United States Immigration Service. One inspector is detailed to handle the case throughout. The same man acts as arresting officer, jailer, inquisitor, investigator, prosecuting attorney, judge, jury, witness and reporter.

We have already demonstrated the unfair tactics used by the inspector as arresting officer, jailer and inquisitor. Now we must look into his activities as investigator. After Keizo Kamiyama had been held in jail two days incommunicado and without bail, on November 19, 1928, he was *officially* arrested.

Presumably the inspector realized that Kamiyama's statement, taken on November 17, was insufficient to support deportation. Therefore, he photographed Kamiyama and toured the countryside with this picture (whether it was a likeness or not does not appear), inquiring indiscriminately of various Japanese if they could identify the picture. Some could and, of course, some could not. A longhand report of these *ex parte* investigations was kept by this same inspector, and was later written up, identified by him as a witness, and admitted in evidence by him as judge.

These *ex parte* examinations appear in the records as statements taken on November 23, 1928. A summary of them is:

1. M. Suruki was examined on the Weston Ranch, who stated that Keizo Kamiyama worked for him for two or three months in 1926. He was unable to identify the picture as being Keizo Kamiyama.

2. Haru Suruki, his wife, was likewise unable to identify the picture as representing Keizo Kamiyama.

3. Tonijiro Nishiseki and K. H. Mori, both examined across the road from the Carson Ranch, stated they never knew anyone represented by the picture.

4. S. K. Muramoto and his son, Wataro Muramoto, examined at Perry, California, both identified the picture as being Keizo Kamiyama who had been around there since 1926.

5. K. Nishimoto, examined *ex parte* at San Pedro, identified the picture as being Keizo Kamiyama, who worked for him for two years commencing in 1924.

On page 6 of the regular hearing of December 27, 1928, (Immigration File), Inspector Scott, in identifying these statements, shows the circumstances under which they were taken. He there states:

> "Insp. Those statements were all taken on the dates referred to—22 and 23 of Nov., 1928.
>
> Q. The photograph you used of the alien and referred to in those statements, where did you obtain them; it was taken, was it not, of the alien in this office, by your Service, on or about Nov. 17, 1928? A. It was taken by this Service on or about Nov. 17th.

Q. At the time you took these statements, you didn't have the alien present, did you? A. Did not.

Q. These were all taken within the radius of ten miles from this office; were they not? A. Within the radius of 25 miles of this office.

(Atty's request for copy of Government Exhibit C granted.)

Q. No shorthand reporter was used in taking these statements so you took them in longhand? A. Yes, sir.

Q. You wrote up your own notes? A. Yes, sir."

Inspector Scott further testified at the regular hearing of March 13, 1929, on page 14 (Immigration File):

"When you took the photograph down and exhibited to these parties whose statements you took on Nov. 22 or 23rd, where was this alien who claims to be Keizo Kamiyama?

Scott: Alien was at liberty under bond. He was released under bond at 5:20 P. M., Nov. 20th.

Keating: Why didn't you take the alien himself down and let the witnesses look at the alien instead of using his photograph?

Scott: Because the alien refused to make any statement further in regard to his right to be and remain in the United States until he had conferred with the attorney.

Keating: An attorney. You could easily have located the alien, could you not, had you wanted to?

Scott: I interviewed the alien on the Bunya Ranch and he advised me that you were handling his case and that any further questions regarding him could be taken up with you.

Keating: A smart client."

Thus, the inspector admits that these statements were taken out of the presence of the alien without notifying

the alien or his counsel where or when they were to be taken. The alien was thus deprived of three rights which we respectfully submit deprived him of due process of law, to-wit: *First*, the right to be confronted by the witnesses; *Second*, the right to be notified of the time and place of the hearing; and *Third*, the right to cross-examine the witnesses against him.

Svarney v. U. S. (C. C. A. 8th, 1925), 7 Fed. (2d) 515 at 517;

Ungar v. Seaman (C. C. A. 8th, 1924), 4 Fed. (2d), 80 at 83;

Kwock Jan Fat v. White (1920) 253 U. S. 454, 64 L. Ed. 1010;

In re Chan Foo Lin (C. C. A. 6th), 243 Fed. 137.

Judge Kerrigan in *Ex parte Mouratis* (D. C. N. D. Cal. 1927) 21 Fed. (2d) 694, comments that too often the attitude of the immigration officials appears to be that of the "hanging judges" of the seventeenth century. But we doubt if even those judges acted as their own prosecutor, witnesses and reporter and proceeded to hold court out of the presence of the accused in the fields, without notice to the accused or opportunity to be present.

A case similar in this respect to the case at bar is the case of *Ex parte Bunji Une* (D. C. S. D. Cal. 1930) 41 Fed. (2d) 239. In that case witnesses were shown what purported to be a photograph of the alien in the absence of the alien and his counsel and without notice to either, and their testimony included in the Immigration File. The court very properly released the alien on *habeas corpus*, and said in its opinion, on page 240:

> "Admittedly the examination of four Japanese witnesses was had in the absence of both petitioner and his counsel and without notice to either. This is in violation of part 2, subdivision D of Rule 19, Immigration Rules of January 1, 1930, which requires that, when counsel is selected, he shall be permitted to be present during the conduct of the hearing. Furthermore, identification of petitioner was made by photograph. This, in the judgment of the court, is a questionable proceeding, open to uncertainties, and does not rise to the standard of due process of law to which peitioner, as well as all other inhabitants of the United States, is entitled, and the court is forced to the conclusion that the proceedings on which the order of deportation is based were unfair within the meaning of the law governing them. U. S. v. Sibray (C. C.) 178 F. 150, 151; Maltez v. Nagle (C. C. A.) 27 F. (2d) 835."

Some point will probably be made by respondent that counsel permitted these *ex parte* statements to become part of the record. It is true that counsel did withdraw his objections to the placing of the evidence in the record, but he did not stipulate that it was fair or could be used against the alien. The objections were withdrawn because he felt that the methods of the trial inspector in the case should be in the record so that the Board of Review at Washington and the court, if necessary, could be fully informed as to the methods and practices of the Immigration Service in this case. Even though the inspector had not put this hearsay testimony in the record, still the fact that he in his capacity of judge went out and interviewed *ex parte* witnesses shows he was certainly taking testimony outside of the record and using it against the alien in his findings.

Now, however, we come to the rankest unfairness in the whole case, and which alone entitles Keizo Kamiyama to

his release. On March 13, 1929, the hearing was over and the case closed so far as the introduction of any testimony was concerned. Thereafter the record, in accordance with the rules of the Department of Labor, was forwarded by the San Pedro office of the Immigration Service to Washington for final determination. Here it should be noted that in deportation proceedings the case is not decided by the trial inspector but by the Board of Review (acting for the Secretary of Labor) in Washington. The findings of the trial inspector are only in the nature of recommendations. In this respect, there is a distinction in the procedure before the Department of Labor in deportation cases and in cases wherein an alien is applying for admission to the United States at a port. In deportation proceedings, the action of the Department of Labor at Washington is not sought by appeal as is true in the case of the denial of admission to an alien at a port. Compare section 3 (8 U. S. C. 136) with section 19 (8 U. S. C. 155) of the Immigration Act of 1917.

The case against Keizo Kamiyama was handled throughout by Immigrant Inspector M. H. Scott, who at the conclusion of the hearing (Immigration File page 17), made his findings and recommendation for deportation in the regular way, which findings and recommendation in the ordinary course of procedure should have gone to Washington with the evidence, as the findings and recommendation in the case. However, the inspector in charge of the United States Immigration Service at San Pedro was not satisfied to allow the record to be transmitted solely with these regular findings and recommendation. He decided to make some of his own and to introduce some additional evidence of which the alien had no knowledge or

notice. We ask the court to pay particular attention to the communication dated May 9, 1929, signed by C. G. Gatley, inspector in charge, and addressed to the District Director of the Immigration Service at Los Angeles, California. Then see the red sheet entitled "Transmission of Records of Warrant Hearings," dated May 22, 1929, whereby the Acting District Director of Immigration at Los Angeles forwarded this extraordinary letter and anonymous communication attached thereto of the inspector in charge at San Pedro, to the department at Washington *as part of the record in the case.*

Inspector Gatley in this official document of May 9, 1929, says in part, as follows (Immigration File Letter of May 9, 1929, page 2):

> "In commenting on this case it is desired to state briefly the facts about two cases coming before this office recently which parallel this case in many respects, First, Consider the case of Heishiro Hamaguchi, *Your* file 29270/1683, Bureau file 55657/138. Hamaguchi when apprehended presented an old passport in the name of Yosusuke Hamaguchi claiming some 20 years residence in the United States and that his age was 41 years. With other evidence secured by the arresting officer this office finally *broke* the alien and he admitted that he had secured that passport as a gift from a party unknown and had kept it with the intent of defeating the Immigration Law. That he had entered the United States from Canada in transit to Mexico in 1927 and that he had smuggled back into the United States shortly thereafter. Now we have conclusive information that the rightful owner of the passport died here in this vicinity in 1919. Second, Consider the case of Tokoichi Uyemura, Your file 29270/2519, Bureau file 55665/442. When this alien was taken into custody he presented not less than a hundred letters dated from 1919 to date, together with some insurance policies all in the

> name of Monji Uyemura and he claimed to be that man. Finally the examining inspector *broke* the alien and it developed that Monji Uyemura was a brother of the alien and that the alien had smuggled into the United States about 2 years ago. *The difference in these cases and the case of the subject was that these two aliens broke and told the truth before the warrant of arrest was applied for and that in this case the alien was released under bond before the examining inspector could get the truth about him,* also the alien in this case was from all indications carefully instructed before he was ever arrested." (Italics ours.)

There we find an out and out admission that the purpose of the Immigration Service in arresting Kamiyama without a warrant, holding him incommunicado and secretly questioning him was not for the purpose of adducing legitimate evidence but for the purpose of *"breaking"* the alien. Also the inspector refers to the evidence adduced in two independent cases, tending to show that two other Japanese aliens at some time were in the United States unlawfully and made claims similar to the claims made by Kamiyama, but that these alien *"broke"* and told the truth, and that therefore the Board of Review should look up those two cases and from them determine what the record would show if Kamiyama had only "broken" and told the "truth." The records in the cases referred to were not produced at the hearing, the alien was not confronted with them, nor was he given any opportunity to explain or rebut that evidence or show that the evidence in those two cases was not applicable to his case, or to make any showing whatever in this regard. Certainly it was not fair to try Keizo Kamiyama upon the facts in the cases of Hamaguchi and Uyemura. The files in those two cases are con-

fidential departmental matters and not open to Keizo Kamiyama or his counsel.

But still more flagrant is the use by Inspector Gatley of an anonymous communication received after the hearing had closed and sent to the department at Washington as part of the record for its consideration. Attached to Inspector Gatley's letter of May 9, and referred to in the postscript is the following:

"Los Angeles, Calif.
April 25, 1929.

"Los Angeles Immigration Station of San Pedro, Calif.

Sis:

I am Giving my attention to the Fict that illegally incomed immigrant and whose character are not very willing to have in this country

Who is Located at Venice Calif. Jap Farmhouse BUNYA Ranch Whose Name is (KAMEYAMA. Doubt name) Print Name is (NAKAWATASHI) age about 21: this Person have deceved united States Officers on Landing on deceved He com from Mexico about two year go. immigration Officers can catch quickly He turns Jap celery Ranch Prisen. Give Prompt attention for May escape again.

Very truly

citizen of Los Angeles

Original received San Pedro April 30th, 1929."

Now, it should be borne in mind that the case was closed on March 13, 1929, and that the postscript to Inspector Gatley's letter of May 9 shows that the anonymous letter was not received until April 30, 1929, or six weeks after the conclusion of the hearing. This document was sent on as evidence in the case. It was not shown to the alien,

nor was he allowed or permitted to see it, nor to cross-examine its author. As we have already pointed out, the courts are unanimous in holding that if an alien is deprived of an opportunity to cross-examine the witness or explain or rebut the evidence used against him, the hearing is unfair.

Svarney v. United States (C. C. A. 8th, 1925) 7 Fed. (2d) 515;

Ungar v. Seaman (C. C. A. 8th, 1924) 4 Fed. (2d) 80 at 83;

Ex parte Radivoeff (D. C. Mont., 1922) 278 Fed. 227;

McDonald v. Siu Tak Sam (C. C. A. 8th, 1915), 225 Fed. 710;

Ex parte Jackson (D. C. Mont., 1920) 263 Fed. 110;

Fat v. White (1920) 253 U. S. 454; 64 L. Ed. 1010;

In re Chan Foo Lin (C. C. A. 6th), 243 Fed. 137.

In the case of *Svarney v. United States* (C. C. A. 8th 1925) 7 Fed. (2d) 515, at page 517, it is said:

> "Deportation proceedings are in their nature civil. The rules of evidence need not be followed with the same strictness as in the courts. . . .
>
> "However, even in such administrative proceedings, fundamental and essential rules of evidence and of procedure must be observed. . . . But the more liberal the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to in-

spect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.

"The right of cross-examination has long been firmly established in English-speaking countries. Wigmore, in his work on Evidence, says (section 1367): 'For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. . . . If we omit political considerations of broader range, cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure. . . .

". . . Our conclusion is that the affidavit in question was not competent evidence, and ought not to have been received, and that its introduction rendered the hearing unfair. . . ."

More specifically with regard to the use of the anonymous communication, we ask the court to consider the case of *Chew Hoy Quong v. White* (C. C. A. 9th, 1918), 249 Fed. 869, wherein an alien was released from custody upon similar grounds. The court there said on page 870:

"Aside from that, we hold that the fact that the immigration authorities received a confidential communication concerning the applicant's right to admission, upon which they acted, and which was forwarded to the Department of Labor for its consideration, was sufficient to constitute the hearing unfair. However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, there clearly is no warrant for basing decision, in whole or in part, on confidential communications, the source, motive, or contents of which are not disclosed to the applicant or her counsel, and where no opportunity is

> afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received."

Conclusion.

In conclusion, we desire to reiterate the statement of the court in *Ex parte Tozier* (D. C. Me., 1924), 2 Fed. (2d) 268 at 270:

> "* * * It cannot be too often repeated that administrative tribunals which exercise such tremendous powers over the liberty of persons, without the safeguards which experience had shown are necessary in court proceedings, and which are at once policeman, prosecutor, judge and jury, are bound to a scrupulous regard for the rights of persons affected by their action."

The Immigration File affirmatively establishes that Keizo Kamiyama was in this country more than five years before the institution of the deportation proceedings. There is absolutely no evidence to the contrary, but only vague suspicions, occasioned by certain minor discrepancies in the statement made by Keizo Kamiyama at the unfairly conducted preliminary examination and the failure of certain indiscriminate aliens at *ex parte* examinations to identify a doubtful photograph.

Furthermore, Keizo Kamiyama was not given a fair hearing consistent with the fundamental conception of due process of law. He was arrested without a warrant, confined incommunicado and forced to give a statement to an inspector charged with the duty of "breaking" him. *Ex parte* evidence and statements were taken and considered. Anonymous communications and secret departmental files

in other cases were likewise used against Keizo Kamiyama.

For the reasons herein indicated, the judgment of the court below should be reversed and Keizo Kamiyama discharged from custody.

Respectfully submitted,

J. Edward Keating,
Theodore E. Bowen,
Attorneys for Appellant.